

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND, JANUARY 30, 2019

REC. CLERK'S OFFICE
STATE CONTROL CENTER

2019 JAN 30 P 1:11

JOINT APPLICATION OF

MECKLENBURG ELECTRIC COOPERATIVE

CASE NO. PUR-2018-00180

and

EMPOWER BROADBAND, INC.

For approval of a management services
agreement and lease agreement under
Chapter 4 of Title 56 of the Code of Virginia

FINAL ORDER

On November 1, 2018, Mecklenburg Electric Cooperative ("MEC" or "Cooperative") and EMPOWER Broadband, Inc. ("EMPOWER") (collectively, "Applicants"), filed their Application for Approval of Affiliate Agreements and Request for Expedited Consideration ("Application") with the State Corporation Commission ("Commission") requesting approval of two affiliate agreements pursuant to Chapter 4 of Title 56 of the Code of Virginia ("Code").¹ MEC is a not-for-profit Virginia utility and consumer services cooperative supplying retail electric distribution services to approximately 31,000 member-consumers in and around the counties of Pittsylvania, Halifax, Mecklenburg, Charlotte, Lunenburg, Brunswick, Greenville, Southampton, and Sussex, Virginia, and Granville, Person, Northampton, Vance, and Warren, North Carolina.² EMPOWER is a wholly owned subsidiary of MEC.³ The requested affiliate agreements consist of a Management Services Agreement and a Lease Agreement (collectively,

¹ Code § 56-76 *et seq.* ("Affiliates Act").

² Application at 2.

³ *Id.*

190150057

"Agreements").⁴ According to the Application, approval of the Agreements will permit MEC to provide services to its affiliate to allow EMPOWER to commence the provision of broadband internet access to citizens and businesses in the Cooperative's certificated service territory and the surrounding areas through the Cooperative's unused fiber optic bandwidth.⁵ According to the Applicants, the services will be provided as long as and to the extent that the Cooperative's personnel and facilities have available productivity and excess fiber optic bandwidth, respectively, and the relationship is economically beneficial for both parties.⁶

On November 29, 2018, the Virginia Cable Telecommunications Association ("VCTA") filed motions, comments, and a request for expedited consideration of its filings in which VCTA requested that the Commission: (a) permit VCTA to participate as a respondent in this docket addressing the Application; (b) appoint a Hearing Examiner to rule on any discovery matters that may arise during the course of this proceeding, including any motions related to the protective treatment of confidential information; (c) shorten the discovery response time to five business days; and (d) permit VCTA to file additional comments.

On November 30, 2018, the Commission issued a Procedural Order establishing certain filing dates. Pursuant thereto, on December 7, 2018, the Applicants filed a response to VCTA's filings, and on December 11, 2018, VCTA filed a reply.

On December 14, 2018, the Commission issued an Order addressing VCTA's filings and the responses thereto ("December 14 Order"). Pursuant to the December 14 Order, the Commission, in its discretion and based on the specific circumstances of this particular

⁴ *Id.* at 1, 4-5.

⁵ *Id.* at 2.

⁶ *Id.* at 2-3.

proceeding,⁷ granted VCTA's motion to participate as a respondent in this proceeding on the condition that such participation did not prevent the Commission from meeting the statutory deadline in this matter.⁸ Accordingly, the Commission established a schedule that directed the filing of a Staff Report by the Commission Staff, additional comments by VCTA, and a reply to the Staff Report and VCTA comments by the Applicants; assigned a Hearing Examiner to address discovery matters and establish expedited procedures for handling discovery; and extended the statutory review period to January 30, 2019, the maximum permitted under Code § 56-77.⁹

On January 7, 2019, the Staff Report was filed in which Staff summarized the results of its investigation of the Application, including the internal controls MEC plans to implement to comply with the Commission's Regulations Governing the Separation of Regulated and Unregulated Businesses of Utility Consumer Services Cooperatives and Utility Aggregation Cooperatives, 20 VAC 5-203-10 *et seq.* ("Co-op Rules"). Staff determined that the Agreements appear to be in the public interest and recommended that the Commission approve the Agreements subject to the requirements outlined in the Appendix to the Staff Report.¹⁰ Staff's recommended requirements are as follows:

- (1) The Commission's approval of the Service Agreement and the Lease Agreement should be limited to five (5) years from the effective date of the

⁷ See December 14 Order at 3-4 (noting, for example, that there are specific statutes and rules – that only apply to cooperatives – addressing behavior among a cooperative, its affiliates, and nonaffiliated third parties. *See, e.g.,* Code § 56-231.34:1 and 20 VAC 5-203-10 *et seq.*).

⁸ See December 14 Order at 2-4 (stating that the Affiliates Act, among other things: (1) directs the Commission to "approve or disapprove" an application in only 60-90 days; (2) deems an application "approved" if the Commission fails to act in that timeframe; (3) gives the Commission "continuing supervisory control" over affiliate transactions; and, further, (4) allows the Commission, unilaterally and on its own motion, to "exempt" a utility from affiliate filing requirements in whole or in part. *See* Code §§ 56-77 A, 56-80, and 56-77 B, respectively).

⁹ December 14 Order at 4-5.

¹⁰ Staff Report at 7.

Order in this case. Should the Applicants wish to continue the Agreements after that date, separate approval should be required.

- (2) The Commission's approval of the Agreements should be limited to those services specifically identified in the Agreements.¹¹ Should the Applicants wish to add a service or material that is not specifically identified in the Agreements, separate Commission approval should be required.
- (3) Separate Commission approval should be required for any changes in the terms and conditions of the Agreements, including changes in services provided and any successors and assigns.
- (4) The approval granted in this case should have no accounting or ratemaking implications.
- (5) The Applicants should be required to maintain records demonstrating that the services provided by MEC to EMPOWER under the Agreements are cost beneficial to the members of MEC. Records of such investigations and comparisons should be available for Staff review upon request. MEC should bear the burden of proving, in any rate proceeding, that it charged the higher of cost or market for all services provided to [EMPOWER]¹² pursuant to the Agreements.
- (6) The approval granted in this case should not preclude the Commission from exercising its authority under Code § 56-76 *et seq.* hereafter.
- (7) The Commission should reserve the right to examine the books and records of any affiliate in connection with the approval granted in this case, whether or not such affiliate is regulated by this Commission.
- (8) The Applicants should file an executed copy of the approved Agreements within ninety (90) days of their execution.
- (9) MEC should be required to include all transactions associated with the Agreements in its monthly service bill and in its Annual Report of Affiliate Transactions ("ARAT") submitted to the Commission's Director of the Division of Utility Accounting and Finance ("UAF Director") on May 1 of each year, subject to administrative extension by the UAF Director. The ARAT should include: (a) The case number in which the Agreements were approved; (b) The names of all direct and indirect affiliated parties to the Agreements; and (c) A calendar year annual schedule showing each

¹¹ The approved Service Agreement Services are specifically identified in MEC's Confidential Response to Staff Data Request No. 1-I.

¹² The Staff Report incorrectly referenced MEC at this point. As the Agreements provide only for services to be provided by MEC to EMPOWER, the affiliate is the correct party to be named here.

Agreement's transactions by month, FERC account, and amount as they are recorded in MEC's books.

- (10) MEC should file with the Commission within 90 days of the date of the Order in this case documentation showing the requirements of Code § 56-231.34:1 and 20 VAC 5-203-30 and -40 of the Commission's Co-op Rules are being met.¹³

In recommending approval of the Agreements under the Affiliates Act, Staff stated that the public benefits associated with the Agreements include EMPOWER lease payments that will cover part of MEC's costs, and cost savings from grants and other outside funding, as MEC builds its fiber optic backbone for communications between its substations.¹⁴ Staff also noted that proposed transactions purportedly will allow the Cooperative to make advantageous use of the unused portion of its fiber optic bandwidth for the benefit of the local community by allowing EMPOWER to provide access to broadband.¹⁵

On January 7, 2019, VCTA filed its Additional Comments and Requests for Relief ("Additional Comments") in which it requested that the Commission deny the Application on the grounds that the arrangements are not consistent with the public interest and have not been demonstrated to be reasonable under the Affiliates Act, and that the Application has not demonstrated compliance with Code § 56-231.34:1 and the Co-op Rules.¹⁶ Alternatively, VCTA requested that if the Application is not denied, the Commission impose the following conditions and limitations on the proposed affiliate arrangements:

- (a) Any construction or acquisition by MEC of any fiber facilities and internet and communication business interests outside the territory of its existing certificate(s) of public convenience and necessity will require separate Commission approval;

¹³ *Id.* at 7-8 and Appendix.

¹⁴ *Id.* at 3-7.

¹⁵ *Id.* at 7.

¹⁶ VCTA Additional Comments at 6.

- (b) MEC and EMPOWER should be required to provide greater transparency to MEC members and to the Staff of the Commission regarding the profitability of EMPOWER, including but not limited to periodic reporting, on at least an annual basis as to (a) when, if, and to what extent its transactions with EMPOWER, including the guarantee of any loan to EMPOWER, results in reductions of its members patronage capital and (b) the extent to which the communications services provided by EMPOWER are offered to (i) totally unserved areas and (ii) areas where existing providers are already providing or have announced plans to soon provide similar services at similar pricing. Such reporting should be publically available or, at a minimum, provided upon request by any MEC member;
- (c) The EMPOWER board of directors should be required to have different directors than those on the MEC board of directors; and
- (d) The ban on joint advertising must include electronic materials including prohibition of any reference to EMPOWER on the MEC website. All descriptions by EMPOWER of its services should exclude any reference to MEC, including but not limited to a prohibition on using the phrase "Powered by MEC."

On January 7, 2019, the Applicants filed their reply to the Staff Report and VCTA's Additional Comments ("Reply"). As to the Staff Report, the Applicants stated that they do not object to the requirements recommended by Staff.¹⁷ With respect to Staff's recommendation in Appendix paragraph (10), the Applicants stated that MEC intends to implement management procedures that memorialize the manner in which MEC and EMPOWER intend to comply with the requirements of 20 VAC 5-203-30 and -40 as described on pages 3-6 of the Attachment to the Staff Report.¹⁸

As to VCTA's Additional Comments, the Applicants asserted that the majority of VCTA's concerns and the resulting "conditions and limitations" VCTA recommends relate to potential conduct of the Applicants after the Commission grants approval of the Agreements, and

¹⁷ Applicants' Reply at 4.

¹⁸ *Id.*

are therefore beyond the scope of the public interest standard of the Affiliates Act and the Commission's jurisdiction in a proceeding under the Affiliates Act.¹⁹ The Applicants cited to the Commission's Final Order in Case No. PUR-2018-00113,²⁰ and argued that the Commission's ongoing oversight authority renders VCTA's proposed conditions and limitations superfluous.²¹ Accordingly, the Applicants requested that the Commission reject the relief requested by VCTA and approve the Application consistent with the requirements set forth in the Staff Report.²²

NOW THE COMMISSION, upon consideration hereof, is of the further opinion and finds as follows.

Code § 56-231.23 provides in part that "[e]ach cooperative formed under this article shall have power to do any and all lawful acts or things including, but not limited to the power: . . . To render service and to acquire, own, operate, maintain and improve a system or systems."

Code § 56-231.34:1 A states in part that:

No cooperative that engages in a regulated utility service shall conduct any unregulated business activity, other than traditional cooperative activities, except in or through one or more affiliates of such cooperative, provided that a cooperative that provides regulated utility services shall have the right to offer and make unregulated sales of electric power to its members within its certificated service territory.

Under the Affiliates Act, the Commission either approves or rejects the "structure" of these affiliate transactions.²³ Any specific costs or obligations stemming from that affiliate

¹⁹ *Id.* at 4-6.

²⁰ *Application of Central Virginia Electric Cooperative and Central Virginia Services, Inc., For approval of affiliate arrangements*, Case No. PUR-2018-00113, Doc. Con. Cen. No. 181050207, Final Order (Oct. 23, 2018) ("CVEC Final Order").

²¹ *Id.*

²² Applicants Reply at 6.

²³ See, e.g., *Commonwealth Gas Services, Inc. v. Reynolds Metals Co.*, 236 Va. 362, 368 (1988) (citing *Roanoke Gas Co. v. Commonwealth*, 217 Va. 850 (1977)).

structure are approved or rejected when the question becomes ripe in separate proceedings under separate statutes, such as setting rates or reviewing proposed generating facilities.²⁴ As stated in our December 14 Order, this is the administrative process – *i.e.*, without a formal hearing and without participation by interested persons – that the Commission typically uses to approve or deny applications under the Affiliates Act.²⁵

In the instant case, we find VCTA's stated concerns to be insufficient bases for requiring a denial of the Application under the Affiliates Act. As Code § 56-231.34:1 A allows cooperatives to engage in unrelated business activities, so too must the Code envision that the cooperative members and the board they elect will weigh the extent to which these unregulated activities possess the potential for both gain and loss. Accordingly, an allegation that a prior MEC communications affiliate was unsuccessful and could not repay a loan,²⁶ is not a basis for denying MEC's request to engage in the affiliate arrangements presently before the Commission. As we said in Case No. PUR-2018-00113, the decision to offer broadband through the fiber deployed as part of an expansion of a cooperative's electric distribution system is a decision for the cooperative and its members,²⁷ and whether a cooperative may have an affiliate undertake to

²⁴ See also *Sierra Club v. Virginia Elec. and Power Co., et al.*, Case No. PUR-2017-00061, Final Order (Sept. 19, 2017), *aff'd Sierra Club v. State Corp. Comm'n*, 2018 WL 3768754 (Aug. 9, 2018) (unpublished).

²⁵ December 14 Order at 3 (stating that this is also why the Commission has previously explained that, unlike the procedures "for investigating proposed changes to rate schedules, . . . [a]pplications filed under [the Affiliates Act] are generally processed *administratively* by the Commission without notice or an opportunity for hearing."). *Application of Columbia Gas of Virginia, Inc.*, Case No. PUE-2007-00064, slip op. at 5, 2007 WL 2759864 at *3, Order for Notice and Comment (July 30, 2007) (emphasis added).

²⁶ See VCTA Additional Comments at 3.

²⁷ See Code § 56-231.23.

offer broadband is not a decision for the Commission, so long as all other statutory and regulatory requirements are maintained.²⁸

Likewise, we do not find that VCTA's stated concerns with the Agreements under Code § 56-231.41 and the related Co-op Rules present sufficient reasons for denying the Application nor approving it with the conditions proposed by VCTA. For example, we find that the Applicants are not required to prove that alternative providers of the prospective service are unavailable before an arrangement may be approved pursuant to the Affiliates Act. Rather, Code § 56-231.34:1 specifically addresses that there shall be Commission rules and regulations to ensure effective and fair competition between an electric cooperative's affiliate that is engaged in an unregulated business activity and other persons engaged in the same or similar business.²⁹ Accordingly, there is no basis to require additional reporting on the extent to which EMPOWER offers services in areas that are (i) totally unserved, (ii) served by other providers, or (iii) where existing providers plan to offer similar services at similar prices.³⁰

Code § 56-231.23 provides that each cooperative shall have the power to do any and all lawful acts or things, including, pursuant to subsection (5), to render service and to acquire, own, operate, maintain, and improve a system or systems. Accordingly, we reject VCTA's proposed condition that "any construction or acquisition by MEC of any fiber facilities and internet and communication business interests outside the territory of its existing certificate(s) of public convenience and necessity will require separate Commission approval." Such a condition is not appropriate as present statutory law governs when MEC may extend its electric distribution

²⁸ CVEC Final Order at 12.

²⁹ The Co-op Rules were adopted and made effective as of July 1, 2000, as directed by the General Assembly in Code § 56-231.34:1.

³⁰ See VCTA Additional Comments at 6-7.

system, with or without Commission approval, and Code § 56-231.34:1 A prohibits MEC from directly engaging in unregulated business activities. In the present case, MEC is deploying a fiber network within its service territory,³¹ and therefore, within the authority provided pursuant to its certificate of public convenience and necessity. Should it be alleged that this is no longer the case, that issue may be addressed in a separate proceeding.

Furthermore, we decline to impose the condition recommended by VCTA regarding the make-up of the board of directors of EMPOWER.³² Code § 56-231.34:1 A directs the Commission to establish codes of conduct detailing permissible relations between a cooperative and its affiliates, particularly with regard to whether and, if so, under what circumstances and conditions: (i) a cooperative may provide its affiliates with customer lists or other customer information, sales leads, procurement advice, joint promotions, and access to billing or mailing systems unless such information or services are made available to third parties under the same terms and conditions; (ii) the cooperative's name, logos, or trademarks may be used in promotional, advertising or sales activities conducted by its affiliates; and (iii) the cooperative's vehicles, equipment, office space, and employees may be used by its affiliates. 20 VAC 5-203-40 contains the codes of conduct adopted by the Commission to be applicable for each scenario. Cooperatives are responsible for following these rules, and any allegation of a violation may be addressed in a separate proceeding irrespective of any authority granted herein. However, in the instant case, the present regulations are silent as to the make up of the affiliate's board of directors. Accordingly, we have no reason to impose a different standard upon MEC and

³¹ See Staff Report at 3-4.

³² See VCTA Additional Comments 7.

EMPOWER than the standard presently imposed on all other cooperatives and their affiliates at this juncture.

As to VCTA's condition regarding the presence of EMPOWER on MEC's website,³³ 20 VAC 5-203-40 of the Co-op Rules is silent as to whether a cooperative is prohibited from referencing its affiliate on the cooperative's website. Furthermore, the specific rules regarding joint promotions do not establish an absolute prohibition, but instead state:

3. Joint promotions, advertising and marketing shall be prohibited between a cooperative and its nonregulated affiliate *unless made available to competing suppliers upon the same price, terms and conditions.*

4. *A cooperative's name, logo or trademark may be used by a nonregulated affiliate provided such use is not misleading.* A disclaimer that clearly and conspicuously discloses that the nonregulated affiliate is not the same company as the cooperative shall accompany any such use. Such disclaimers shall not be required, however, on company vehicles, clothing, trinkets, writing instruments, or similar promotional materials. Upon complaint of any competing supplier or other interested person, or upon motion of the Attorney General or the commission staff, or upon its own motion, the commission may, after notice and an opportunity for hearing, make a determination whether any such usage is misleading, and if so, take appropriate corrective actions.³⁴

Accordingly, we find no reason to impose the requested condition at this juncture. Instead, as we did in Case No. PUR-2018-00113,³⁵ we will direct the Staff to monitor the activities of MEC and EMPOWER to ensure that the codes of conduct set out in 20 VAC 5-203-40 are followed and that the prohibited practices set out in 20 VAC 5-203-30 are avoided while exercising the approval granted herein.

As noted above, in a proceeding such as this, the Commission either approves or rejects the "structure" of the affiliate transactions. While any specific costs or obligations stemming

³³ See *id.*

³⁴ 20 VAC 5-203-40 3 and 4 (emphasis added).

³⁵ See CVEC Final Order at 11.

from that affiliate structure would be approved or rejected when the question becomes ripe in separate proceedings under separate statutes, such as setting rates or reviewing proposed generating facilities, so too would be any concerns about the Applicants' conduct in exercising any authority granted herein about the Agreements. That is, the prohibitions and obligations under 20 VAC 5-203-10 *et seq.* are continuing in nature, just like the Commission's oversight authority over arrangements approved under the Affiliates Act.³⁶

Upon consideration of the foregoing, we find that that the Agreements proposed herein are in the public interest and should be approved for purposes of the Affiliates Act subject to certain requirements set forth in the Appendix attached hereto.

Accordingly, IT IS ORDERED THAT:

(1) Pursuant to Code § 56-77, the Applicants hereby are granted approval to enter into the Agreements as described herein and subject to the requirements set forth in the Appendix attached to this Order.

(2) The Staff shall monitor MEC and EMPOWER to ensure that codes of conduct set out in 20 VAC 5-203-40 are followed and that the prohibited practices set out in 20 VAC 5-203-30 are avoided while exercising the approval granted herein.

(3) This case hereby is dismissed.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to:
 Michael L. Hern, Esquire, James Patrick Guy II, Esquire, and Garland S. Carr, Esquire,
 LeClairRyan, PLLC, 919 East Main Street, 24th Floor, Richmond, Virginia 23219;
 Peter E. Broadbent, Jr., Esquire, and Cliona Mary Robb, Esquire, and Louis R. Monacell,
 Esquire, Christian & Barton, L.L.P., 909 East Main Street, Suite 1200, Richmond, Virginia

³⁶ See Code § 56-80.

23219-3095; and C. Meade Browder, Jr., Senior Assistant Attorney General, Division of Consumer Counsel, Office of the Attorney General, 202 N. 9th Street, 8th Floor, Richmond, Virginia 23219-3424. A copy also shall be delivered to the Commission's Office of General Counsel and Divisions of Utility Accounting and Finance and Public Utility Regulation.

130150057

APPENDIX

- (1) The Commission's approval of the Service Agreement and the Lease Agreement shall be limited to five (5) years from the effective date of the Order in this case. Should the Applicants wish to continue the Agreements after that date, separate approval shall be required.
- (2) The Commission's approval of the Agreements shall be limited to those services specifically identified in the Agreements.³⁷ Should the Applicants wish to add a service or material that is not specifically identified in the Agreements, separate Commission approval shall be required.
- (3) Separate Commission approval shall be required for any changes in the terms and conditions of the Agreements, including changes in services provided and any successors and assigns.
- (4) The approval granted in this case shall have no accounting or ratemaking implications.
- (5) The Applicants shall be required to maintain records demonstrating that the services provided by MEC to EMPOWER under the Agreements are cost beneficial to the members of MEC. Records of such investigations and comparisons shall be available for Staff review upon request. MEC shall bear the burden of proving, in any rate proceeding, that it charged the higher of cost or market for all services provided to EMPOWER pursuant to the Agreements.
- (6) The approval granted in this case shall not preclude the Commission from exercising its authority under Code § 56-76 *et seq.* hereafter.
- (7) The Commission reserves the right to examine the books and records of any affiliate in connection with the approval granted in this case, whether or not such affiliate is regulated by this Commission.
- (8) The Applicants shall file an executed copy of the approved Agreements within ninety (90) days of their execution.
- (9) MEC shall be required to include all transactions associated with the Agreements in its monthly service bill and in its Annual Report of Affiliate Transactions ("ARAT") submitted to the Commission's Director of the Division of Utility Accounting and Finance ("UAF Director") on May 1 of each year, subject to administrative extension by the UAF Director. The ARAT shall include: (a) the case number in which the Agreements were approved; (b) the names of all direct and indirect affiliated parties to the Agreements; and (c) a calendar year annual schedule showing each Agreement's transactions by month, FERC account, and amount as they are recorded in MEC's books.

³⁷ The approved Service Agreement Services are specifically identified in MEC's Confidential Response to Staff Data Request No. 1-1.

- (10) MEC shall file with the Commission within 90 days of the date of the Order in this case documentation showing the requirements of Code § 56-231.34:1 and 20 VAC 5-203-30 and -40 of the Commission's Co-op Rules are being met.

10015057